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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 217

UNITED STATES OF AMERICA, PETITIONER

v.

ALEXANDER LAWRENCE ALPERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction, in the United States District Court for the Northern District of California, Southern Division, for knowingly depositing obscene phonograph records with an express company for carriage in interstate commerce, in violation of the provisions of Section 396 of Title 18, U.S.C. (1946 ed.), Criminal Code, Section 245, now Section 1462 of Title 18, U.S.C.[1]

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[1] Except for minor changes in phraseology and style, the relevant provisions of Section 1462 of the new Title 18, U.S.C. are identical with those of Section 396 of Title 18, U.S.C. (1946 ed.). See Appendix, *infra*, for the two statutes.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 14-18) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1949 (R. 19). On June 30, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to July 30, 1949 (R. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See, also, Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether section 396 of Title 18, U.S.C. (1946 ed.)—penalizing the interstate shipment of "any obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character"—prohibits the shipment of obscene phonograph records.

STATUTE INVOLVED

The pertinent statute (Criminal Code, sec. 245, 18 U.S.C. 396 (1946 ed.)) is set forth in the Appendix, *infra*.

STATEMENT

Respondent was duly charged by information, in three counts, with knowingly depositing with the Railway Express Agency for carriage in interstate commerce certain obscene phonograph records, in violation of the provisions of Section 396 of Title 18, U.S.C. (1946 ed.) (R. 2-5).

Jury trial was waived (R. 6, 8), and respondent pleaded not guilty (R. 8). On December 23, 1948, he was tried and found guilty by the District Court on two counts of the information, and the third count was dismissed (R. 8-9). The court imposed a sentence of a fine of $100 on each of the two counts (R. 9). Respondent appealed solely on the ground that the statute did not cover phonograph records (R. 10, 13). He did not challenge the fact of interstate shipment nor that the records contained obscene matter (R. 15). The conviction was reversed by the Court of Appeals for the Ninth Circuit on respondent's ground that obscene phonograph records are not within the prohibition of Section 396 of Title 18, U.S.C. (1946 ed.), now 18 U.S.C. 1462 (R. 15-18).

REASONS FOR GRANTING THE WRIT

Although it concedes that the transportation of obscene phonograph records involves precisely the mischief which Section 396 was designed to suppress (R. 16), and also that such records may normally be described as "matter of indecent character", the general term used in the statute (R. 16), the Court of Appeals nevertheless holds that records are not within the legislative prohibition because the method of communication to the human mind is entirely different from the methods specifically enumerated by Congress in the section (R. 18). This restrictive interpretation wholly nullifies the statutory phrase "other matter of

indecent character", opens interstate commerce to much obscene material, defeats the obvious purpose of the legislation, and is an erroneous application of the rules as to *ejusdem generis* and the strict construction of penal acts.

1. Construing the objects expressly mentioned in the statute ("book, pamphlet, picture, motion-picture film, paper, letter, writing, print") as all involving visual methods of communication, the court below concludes that the statute distinguishes between visual and auditory means of conveying obscenity, and prohibits only the former. It finds almost its sole support for this theory in the 1920 amendment (Act of June 5, 1920, 41 Stat. 1060), adding motion picture films to the enumerated specific items despite the fact that the words "or other matter of indecent character" were already contained in the statute. This change, the lower court reasons, proves that prior to 1920 only visual representations were barred, and only those, in addition, which did not require the use of mechanical methods for their presentation. By the 1920 amendment, the statute was extended to include classes of items of visual representation which require the aid of a mechanical device, but the act was still limited to visual means of communication (R. 16-17).

Even as formulated, this strained interpretation encounters very heavy weather when it approaches the area of obscene braille books, sound-

tracks on motion picture films, or the new ribbon-type recording prints. But its basic fallacy lies in the gratuitous assumption that Congress definitively intended Section 396 to cover only "visual representations", although auditory and other means of communication are readily capable of conveying the very evil which Congress has long been solicitous to eradicate in its sphere of control. There is no hint anywhere in the legislative history of the narrow and deliberately ineffective purpose assumed by the Court of Appeals. The 1920 addition of "motion-picture film" indicates, we believe, that Congress was anxious to make doubly sure that this new method of universal popular entertainment, which at that time was being widely condemned for immorality, be kept free from salaciousness.[2] To us, the amendment, far from being proof of a restrictive purpose, is a confirmation by Congress of its firm desire to ensure that all means and methods of

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[2] The amendment's formal legislative history shows no more than that it sought to amend the statute by "adding the words 'motion picture films' to the list" of prohibited articles. H. Rept. No. 580, 66th Cong., 2d Sess.; S. Rept. No. 528, 66th Cong., 2d Sess.; 59 Cong. Rec. 2178-9, 7162, 7297, 8280, 8334. There was no intimation that this "addition" was compelled by the belief that the statute did not then cover this item, rather than by a desire to leave no possible loop-hole.

During and immediately after World War I, the American motion picture industry grew enormously, and there was widespread and increasing condemnation of "sensationalism" and of the immoral character of many films. See *The Motion Picture Industry* (Nov. 1947), 254 Annals of the Amer. Acad. of Pol. and Soc. Sci., at pp. 7-9, 140, 155, 157. It is reasonable to assume that the Act of June 5, 1920 was a Congressional response to this public reaction.

communicating obscenity be barred from interstate commerce. And the very comprehensiveness of the listing of specific items, taken together with the inclusion of a general concluding phrase ("or other matter of indecent character"), strongly suggests the all-embracing character of the prohibition.[3]

2. If the general words of the section are to be limited to objects employing visual means of representation, as the Court of Appeals has held, then they are effectively excised from the act, for it is quite clear that the specific items are sufficiently comprehensive to exhaust that genus and leave nothing essentially similar upon which the general terms may operate. But this Court has long since held that the rule of *ejusdem generis* may not be invoked to render the general words of a statute superfluous, since such an application would disregard the primary principles that effect should be given to every part of a statute if legally possible, and that the words of a statute are to be taken according to their natural meaning. *Mason* v. *United States*, 260 U.S. 545, 554. Legislatures normally adopt alternative or additional provisions for the purpose of affording *added* safe-

[3] It is clear that Congress has not limited its general policy of prohibiting the communication of obscene material to visual means of communication. The uttering of "obscene, indecent, or profane language" over the radio has long been forbidden. Radio Act of 1927, Sec. 29, 44 Stat. 1162, 1173; Communications Act of 1934, 48 Stat. 1064, Sec. 326, 47 U. S. C. (1946 ed.) 326; 18 U. S. C. 1464.

guards, and the rule of statutory construction gives no warrant for reading them as if they were merely repetitious. Cf. *United States* v. *Gilliland*, 312 U.S. 86, 93. Moreover, in criminal statutes as well as in others, there is no justification for mechanically applying *ejusdem generis* to subvert a plain legislative intention. As this Court said in *Gooch* v. *United States*, 297 U.S. 124, at 128:

> The rule of *ejusdem generis* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view.

No rule of statutory construction requires an interpretation of Section 396 which would distort or nullify the obvious meaning and purpose of this legislation. It is sufficient if the words are given their fair meaning in accord with the intent of Congress. As the Court of Appeals admits (R. 16), the shipment of obscene phonograph records in interstate commerce is clearly within the mischief which the statute is designed to suppress, and likewise comes within the normal meaning of the statutory phrase "other matter of indecent character". It is natural to couple obscene records with

books and the other articles specifically mentioned; they are ordinarily considered as in the same general class.[4] It follows that obscene records are "fairly within [the] letter and spirit" of the statute (cf. *Swearingen* v. *United States*, 161 U. S. 446, 451), and to refuse to include them strains, distorts, and limits the act's effectiveness, contrary to the purpose and words of Congress. Cf. *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *United States* v. *Gaskin*, 320 U. S. 527, 529.

3. The question presented is one of importance in the administration of the law prohibiting the means of interstate commerce to be used in transporting obscene matter. The decision below, if permitted to stand, will enable purveyors of obscene matter to introduce their wares into interstate commerce by resorting to phonograph records and other devices for auditory communication. A substantial gap will thus be broken in the dike Congress has erected against the flow of obscene, lascivious, lewd, or filthy material.[5]

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[4] Like books and other printed material, records convey obscenity by use of language; they are also capable of repeated use in the dissemination of obscenity, are readily portable, and may easily be concealed. Exactly the same types of obscenity may be conveyed by records as by books, the only difference being in the sense which receives the communication.

[5] The Court of Appeals' decision may also have an effect on the interpretation of 18 U.S.C. 1461, dealing with the *mailing* of obscene matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1949

APPENDIX

1. Section 396 of Title 18, U. S. C. (1946 ed.), Criminal Code, Sec. 245, provides:

Importing and transporting obscene books.

Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned ar-

ticles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. Section 1462 of Title 18, U. S. C. (effective September 1, 1948) provides:

§ 1462. Importation or transportation of obscene literature.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter

r thing the depositing of which for carriage
s herein made unlawful—

Shall be fined not more than $5,000 or im-
risoned not more than five years, or both.

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